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In The

Supreme Court of the United States

October Term, 1992

MIDWEST PRIDE, III, INC., MICHAEL F. MORAN, STANLEY E. MILLER, DONALD BAUMGARTNER, FRANK E. FINDO,

Petitioners,

vs.

STATE OF OHIO, EX REL. ROBERT L. BECKER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

REPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is a state statute which authorizes the closure as a public nuisance of "any place in or upon which lewdness . . . is conducted, permitted, continued or exists" unconstitutional under the Fourteenth Amendment due to vagueness as several courts, including the highest courts of Iowa, New Mexico and Michigan have held or does such a statute give adequate warning of its proscriptions so as to satisfy due process of law as several other courts, including the highest courts of Virginia, Wisconsin, and, in this case, Ohio have determined?

II. Is such a statute unconstitutional under the Fourteenth Amendment due to vagueness if, as construed by the highest court in the state, it authorizes the closure as a public nuisance of "any place in or upon which [public sexual activity that is reprehensible or disgusting] is conducted, permitted, continued or exists"?

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OPINIONS BELOW

The opinions of the Licking County Court of Common Pleas, the Court of Appeals for the Fifth Appellate District of Ohio and the Ohio Supreme Court's denial of petitioners' petition for certiorari are adequately set forth.

JURISDICTION

The jurisdictional statement is adequately set forth in the appendix to the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the United States Constitutions and the Public Nuisance Statutes of Ohio are adequately set forth in the petition and the appendix to the petition.

STATEMENT OF THE CASE

On December 11, 1990, Robert L. Becker, Prosecuting Attorney of Licking County, Ohio filed a nuisance action pursuant to Ohio Revised Code Chapter 3767 in an effort to abate the activity occurring on the premises of the Lions Den Adult Book Store located at 6762 Hebron Road, Hebron, Licking County, Ohio.

A restraining order was issued on December 11, 1990, restraining petitioners and all other persons from removing or in any manner interfering with the personal property and contents of the Lions Den Adult Book Store until further order of the court. The court further ordered that the Sheriff of Licking County, Ohio serve a certified copy of the order and post certified copies of this order on the entrances to the premises. The Sheriff was also ordered to make and return an inventory of the personal property and contents in the premises.

A temporary injunction hearing was held pursuant to statute. Respondent-Plaintiff presented evidence of sexual activity occurring on the premises. Petitioners offered no evidence. On March 11, 1991, at the conclusion of the hearing the court issued a written order enjoining the use of 20 individual booths, the two preview booths and the

big screen T.V. area for the purposes of viewing, exhibiting or showing adult videos or films because of the lewd activity occurring in those areas. The restraining order and the temporary injunction were to remain in effect until the court's final decision on respondent's application for a permanent injunction.

On April 8, 1991, after hearing further evidence, the court issued a permanent injunction finding that a nuisance existed at the premises known as the Lions Den Adult Book Store because it was a place in or upon which lewdness was conducted, permitted, continued or existed. The Court then ordered the entire premises be closed against its use for any purpose for a one year period, unless sooner released. The court held in abeyance decision on all matters pertaining to the seizure, removal or sale of personal property and contents of the store.

Two further orders of the trial court denied the property owner's motion for release of property and ordered the confiscation of all electronic video equipment and screens used to exhibit adult films, and the seizure of all adult films located on the premises.

A final judgment entry was filed April 26, 1991, wherein the court reiterated its findings and orders of April 8, 1991, perpetually enjoining all defendants except Frank Findo from further maintenance of the nuisance.

An appeal was taken to the Fifth Appellate District Court of Appeals for Ohio which was dismissed for lack of an appealable order. A *nunc pro tunc* entry was filed on December 11, 1991 and an amended *nunc pro tunc* entry was filed on February 26, 1992. An appeal to the Fifth District Court of Appeals was taken and decision was

issued on June 15, 1992, overruling petitioners' assignment of error alleging that the term lewd was unconstitutionally vague.

Petitioners filed a motion in the Ohio Supreme Court for an order directing the Court of Appeals for Licking County to certify its record and claimed an appeal as of right. The Ohio Supreme Court overruled petitioners' motion. Thereupon, petitioners filed this Petition for a Writ of Certiorari to the Ohio Supreme Court.

STATEMENT OF FACTS

The Lions Den Adult Book Store, located at 6762 Hebron Road, Heath, Licking County, Ohio, was engaged in the business of selling adult oriented video tapes and magazines as well as sexual aids and devices. The Lions Den Adult Book Store also provided on site viewing of videotapes and movies. Neither the on site viewing nor the sale or rental of movies and magazines were the basis for the nuisance action. The focus of the investigation and abatement action was the sexual activity occurring on the premises.

The interior of the building consisted of four (4) sections: the "counter area"; the "quarter booth" or "arcade" area; the "preview booth" area; and the large screen TV area.

Entry into the building was gained through an exterior door directly into the counter area. In this area was located the counter which contained a display of various

sexually-oriented paraphernalia. Adult videos and magazines lined the wall. The "on duty" clerk worked at the counter. There was no charge for admission into the counter area.

The quarter booth area consisted of twenty (20) separate viewing booths measuring three (3) feet by three (3) feet. Entry into this area was free, but once entry was made into each separate booth, a payment of one quarter was required in order to start the showing of a part of an adult film. During the investigation, investigators on several occasions obtained quarters from two clerks for use in the quarter booths.

The preview booth area consisted of two larger versions of a quarter booth. Each preview booth was approximately 4½ feet by 4½ feet. Entry into these booths required the payment of $5.00. Payment was made to the on duty clerk at the counter. The patron could then pick any film in the counter area which he would give to the clerk. The patron would then go into one of the booths and the clerk would start the selected movie. The clerk had total control over the movie. The customer could control volume only.

The large screen TV area was a mini theater. Fourteen (14) separate chairs and a four (4) seat bench seat all faced a large TV screen. Entry into this area cost $4.00. Payment was made to whichever clerk was working the counter. A full-length adult film would be shown on the big screen. The showing of the film was controlled by the clerk.

The investigation into the activities occurring at the Lions Den Adult Book Store commenced on May 29, 1990,

with a meeting between the Licking County Sheriff and the Licking County Prosecutor. The purpose of the meeting was to organize an investigation into the activity occurring in the bookstore.

The investigation consisted of the collection of evidence from a trash dumpster located in the parking lot of the Lions Den, the swabbing, with a Q-tip, of the walls of each and every video viewing booth (both the quarter and preview booths), the collection of debris found in the booths, and the observation of open acts of masturbation inside the Lions Den. The evidence collected was submitted to the Court at the temporary injunction hearing and at the permanent injunction hearing.

Specifically, the evidence collected and presented to the court at the temporary injunction hearing consisted of ten (10) used condoms, paper towels, hankies, tissues and other items. Also introduced were swabs from seven (7) separate video booths and swabs from the two (2) preview booths. All parties stipulated that this evidence was examined by a qualified expert and the examination revealed the presence of human semen on most if not all of the items.

Further evidence of sexual activity was presented to the court at the permanent injunction hearing, including seven (7) additional used condoms, more napkins, hand towels, cotton ball swabs, and swabs from thirteen (13) remaining video viewing booths. Human semen was found on most if not all of these items. In total, respondent introduced ninety-four (94) exhibits. Of these exhibits, sixty-seven (67) tested positive for human semen. There was testimony concerning a sign posted in

the premises during the course of the investigation that read:

> Notice. We need your help. The Sheriff wants to close us down. So please put your trash in the proper container. Thank you for your help.

In addition to the physical evidence noted above, respondent introduced the testimony of four (4) separate witnesses who observed open and public masturbation by patrons of the Lions Den.

SUMMARY OF RESPONDENT'S ARGUMENT

1. The sexual activity occurring in a bookstore is not protected by the First Amendment to the United States Constitution. Merely because activity occurs on premises where presumptively protected material is sold does not insulate the premises from statutory regulation.

2. Since Chapter 3767 of the Ohio Revised Code does not impinge on a constitutionally protected right, the statute can only be found facially invalid if there is no possible set of facts to which the statute can be applied. The burden is on the petitioner to prove the unconstitutionality of a state statute.

3. The provisions of the nuisance abatement statute in Ohio are civil in nature. Civil statutes are not held to the same high standards of specificity as are criminal statutes that impinge on personal freedom. Petitioners cannot be incarcerated, and the nature of the statute is equitable.

4. The term "lewd" is a common-sensical term that has an ordinary meaning to persons. The conduct of petitioners falls squarely within the prohibitions of the statute.

5. The constitutionality of a statute is presumed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Sexual Activity Occurring In The Lions Den Adult Bookstore Is Not Protected By The First Amendment.

It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489 (1982); *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *United States v. Mazurie*, 419 U.S. 544 (1975). Even though petitioners attempt to turn this into a First Amendment case, the fact remains that what is at issue is sexual activity in a public place and such activity is not protected by the First Amendment. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

Petitioners' allegation that the nuisance statutes are being used to completely suppress "concededly protected expression" is unsupported and is an attempt to turn this action into a First Amendment issue. This Court in *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986), has specifically rejected this position and has stated that the closure of an

adult bookstore based on activity occurring on the premises was not unconstitutional and did not violate the First Amendment.

Petitioners attempt to mislead this Court by string citing the nuisance actions brought against adult bookstores in the State of Ohio, then making the broad statement that "In each of these cases, a bookstore was shut down, the personalty seized and fines levied." (Petitioners' Brief at p. 27.) In all of the cases cited by petitioner, with the exception of the instant case, the movies, videotapes, magazines and even the sexual aids were returned to the named defendants at the time the temporary order was issued. The personalty seized in these cases was the video equipment, chairs, and in some instances the cash registers used to collect the money for the movie rooms or booth areas. In the instant case, there was evidence that the movies were utilized in conducting or maintaining the nuisance.

Further, in each of the cases wherein a bookstore was closed, either partially allowing the retail area to remain open, or completely, the owners were free, after the expiration of the one year closure, to reopen and resume their business of selling adult materials and offering on-site viewing, providing of course they did not allow the nuisance to reoccur.

The public nuisance statutes of the Ohio Revised Code are not censorial nor do they single out bookstores dealing in "adult material" for enforcement actions. The statute does not unduly penalize speech, political or otherwise. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). However, as pointed out by petitioners, numerous adult

bookstores and the owners and agents of the bookstores were permanently enjoined from conducting, permitting, continuing or allowing lewdness, assignation or prostitution to exist. Further, numerous bookstores were closed, either completely or in part, for one year in order to abate the activity occurring on the premises. It is important to note that the masturbation and public sexual activity occurring in the Lions Den Adult Bookstore, and the activity which was sought to be restrained and abated in previous nuisance abatement acts, was identical. This activity falls squarely within the prohibitions of the statute as construed by the Supreme Court of Ohio.

Petitioners further complain that they could not know what the statute meant by lewd activity. It is again important to note that the activity sought to be abated in the instant action was identical to the activity in the subsequent nuisance abatement actions brought against other premises. Perhaps more importantly, at least one of the petitioners in the instant case, Michael Moran, was a defendant in two previous nuisance abatement actions brought in Franklin County and one nuisance abatement action in Guernsey County. The basis of those actions has been the sexual activity occurring on the premises. It appears that even when petitioners have direct knowledge of the activity a court deems to be lewd, they choose to ignore the activity and carry on business as usual.

It appears that petitioners are attempting to argue that there is selective prosecution but they failed to make this argument below and petitioners fail to present that question to this Court for review, thereby abandoning this claim. Further, petitioners presented no evidence on this claim at the trial level.

2. Since the Statute Does Not Implicate Constitutionally Protected Freedoms, The Statute As Applied and Construed by The Ohio Supreme Court Is Not Unconstitutionally Vague.

When a statute does not implicate constitutionally protected conduct, the Court should uphold the statute unless the enactment is impermissibly vague in all of its applications and so utterly void of a standard of conduct that it has no core and cannot be validly applied to any conduct. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489, 495 (1982), *United States v. Powell*, 423 U.S. 87 (1975). Petitioners make no such showing. Indeed, petitioners are parties whose conduct is clearly proscribed and therefore cannot be heard to complain of the vagueness of the law as applied to the conduct of others. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489, 495 (1982).

The evidence shows that four witnesses entering the viewing areas as paying customers observed persons masturbating. More than 60 exhibits presented at the trial court level, including condoms, tissues, towels, swabs taken from the walls and floors, and other articles taken from the Lions Den Book Store, tested positive for the presence of semen. A sign in the booth area read:

> Notice. We need your help. The Sheriff wants to close us down. So please put your trash in the proper container. Thank you for your help.

To sustain a facial vagueness challenge the challenger must prove that the statute is vague:

> Not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).
>
> [I]mpossible standards of specificity are not required . . . The test is whether the language of the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

The evidence before the trial court demonstrated a continuing course of conduct that must be described as that which reasonable minds would conclude exceeds the minimal guidelines established by our lawmakers governing the conduct of our citizenry. Indeed petitioners knew what activity could cause them to run afoul of the statute and attempted to hide the activity or rather to hide the evidence of the activity from law enforcement. Petitioners' vagueness argument fails.

3. Chapter 3767 of the Ohio Revised Code Is Civil In Nature and Not Held To The Same Exacting Standards of Specificity As Criminal Statutes.

The statutes in question are civil in nature, not criminal. This Court has expressed a greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 445 U.S. 489, 499 (1982). *See also, Barenblatt v.*

United States, 360 U.S. 109 (1959); *Winters v. New York*, 333 U.S. 507, 515 (1948).

4. The Term "Lewd" Is Common-sensical Term That Need Not Be Narrowly Defined.

The term "lewd" is a common-sensical term that need not be narrowly defined. This Court in *Osborne v. Ohio*, 110 S.Ct. 1691 (1990) and *Miller v. California*, 413 U.S. 15 (1973) implicitly upheld the constitutionality of the term "lewd" when this Court used the term as a plain example of what a state statute could define for regulation.

Taken within the context of the statute, the term "lewd" is sufficient to notify an ordinary person, exercising ordinary common sense, and he can sufficiently understand and comply with the statute without sacrificing the public interest. *Broadrick v. Oklahoma*, 413 U.S. 600, 608 (1973).

5. The Constitutionality of A Statute Is Presumed.

That other states have differing definitions or interpretations of similar words or phrases does not make Ohio's definition unconstitutionally vague.

States are separate sovereigns which draw their authority from their own inherent sovereignty . . . *United States v. Wheeler*, 435 U.S. 313 (1978). "Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses and in doing so each 'is exercising its own sovereignty, not that of the other.' " *Wheeler, supra*

at 320, quoting *United States v. Lanza*, 26 U.S. 377 (1922); *see also, Heath v. Alabama* 474 U.S. 82 (1985).

As far back as 1827 this Court has held that the burden of proving the unconstitutionality of a statute must be borne by the person challenging the statute. *Brown v. State of Maryland*, 25 U.S. 419 (1827). The statutes of the states are presumed to be constitutional:

> It is . . . a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interest of the people as a whole and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 104, 19 S. Ct. 609, 612.

Chapter 3767 of the Ohio Revised Code is entitled to the presumption of constitutionality.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present issues that would warrant further review by this court. It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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